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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 805

JOHN J. CARROLL, PETITIONER,

vs.

CHARLES U. BECKER, SECRETARY OF STATE OF THE STATE OF MISSOURI, JEFFERSON CITY, MISSOURI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

E. F. COLLADAY,
Counsel for Petitioner.

HYMAN GOLDSTEIN,
Of Counsel.

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CHARLES U. BECKER, SECRETARY OF STATE OF THE STATE OF MISSOURI, JEFFERSON CITY, MISSOURI, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of John J. Carroll respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Your petitioner, John J. Carroll, respectfully states that he is aggrieved by the judgment of the Supreme Court of the State of Missouri rendered on the 4th day of January, 1932, in a suit wherein this petitioner

sought a writ of mandamus to compel the respondent as Secretary of State of the State of Missouri, to receive and file this petitioner's written declaration as a candidate on the ticket of the Democratic Party of Missouri for the office of Representative from the Tenth Congressional District of the State of Missouri in the House of Representatives of the Congress of the United States, which said Tenth District was designated a subdivision of the State of Missouri as a Congressional District pursuant to and by an Act and Bill passed by the 56th General Assembly of the State of Missouri at its session in 1931, and known as "Committee Substitute for Senate Bills 95, 141 and 147, 56th General Assembly of Missouri," and by the terms and provisions of which said Bill the State of Missouri was divided into thirteen Congressional Districts and wherein it was provided that the legal voters of each district should elect one member of Congress of the United States (R. 11).

Your petitioner is a resident, citizen, inhabitant, and elector of the State of Missouri and in the City of St. Louis, Missouri, in the Fifth Ward of said city and in the Tenth Congressional District of the State of Missouri and is now twenty-eight years of age and has resided in said State since the time of his birth.

The Federal and State laws applicable are referred to, briefly, as follows:

Following the 1910 Federal Census Congress passed the Act of August 8, 1911 (37 Stat. L. 13) (Appendix D, page 42) providing for the apportionment among the several States of 435 members, of which Missouri had 16.

Congress did not pass a reapportionment act based on the 1920 census, but anticipated the census of 1930 in the Act of Congress of June 18, 1929 (46 Stat. L. 26) (Appendix C, page 40). Pursuant to this Act the President of the United States transmitted to Congress his message and statement showing the returns of the 1930 census (R. 2-3) and thereupon and upon the failure of Congress to act the Clerk of the House of Representatives certified to the Governor of the State of Missouri the fact that the State of Missouri under said census was entitled to 13 representatives in Congress (R. 3) instead of 16.

Prior to the enactment by the 56th General Assembly of the Act and Bill known as "Committee Substitute for Senate Bills 95, 141 and 147, 56th General Assembly of Missouri," the last districting of the State of Missouri for congressional purposes was by the laws of Missouri 1901, page 87, and which are now reported and quoted as Chapter 63, Revised Statutes of Missouri, 1929, and by the terms whereof the State of Missouri was divided into 16 congressional districts, the legal voters of each district to elect one member of Congress of the United States.

The 56th General Assembly of the State of Missouri at its session in 1931 duly passed a Bill for an Act known as "Committee Substitute for Senate Bills 95, 141 and 147, 56th General Assembly of Missouri," which said "Bill for an Act" is set forth at length in the petition (R. 11) and by said "Bill for an Act" it was provided that the State of Missouri was thereby divided into 13 congressional districts, the

legal voters of each district to elect one member of Congress of the United States and that the Tenth District should be composed of the following wards and precincts as now constituted in the City of St. Louis:

Wards 5, 6, 7, 8, 9, 14, 15, 16, 17 and 20 and Precincts 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of Ward 19. Said bill so passed by the 56th General Assembly of the State of Missouri in 1931, was transmitted to the Governor of Missouri on April 24, 1931, and on the following day he returned the same to the State Senate without his approval and with his written objections as set forth in Respondent's Exhibit "A" (R. 50) and thereafter there was no further action by the General Assembly of Missouri with reference to said "Bill for an Act" and the 56th General Assembly of the State of Missouri adjourned *sine die* on the 15th day of June, 1931, and since that date has not been called in special session and is not now in session. Said "Bill for an Act" in form as passed is now on file and of record in the office of the Secretary of State (Petitioner's Exhibit "A", R. 11).

On October 26, 1931, in accordance with the laws of Missouri in such case made and provided, the petitioner paid to the Treasurer of the Missouri Central Committee of the Democratic Party, upon whose ticket he proposes as a candidate and seeks nomination as and for Representative from the Tenth Congressional District of the State of Missouri in the House of Representatives of the Congress of the United States, the filing fee required by law and took a receipt there-

for, and presented a written declaration of his said candidacy in form and substance as required by the laws of Missouri, together with said receipt to the respondent, the Secretary of the State of Missouri, at respondent's office in the State Capitol, and requested respondent to accept and file the same which said request was by the respondent refused. Thereupon, petitioner filed in the Supreme Court of Missouri his petition for a Writ of Mandamus directed to the respondent commanding him to accept from Relator for filing and to file said written declaration of petitioner's candidacy. An alternative writ of mandamus directed to the respondent was issued by said Court and to such alternative writ respondent filed his return (R. 44), which in substance set forth that the said "Bill for an Act" passed by the 56th General Assembly of Missouri was vetoed by the Governor of Missouri on April 25, 1931, and that no further action was taken thereon by the General Assembly and that said Act is void and of no effect and that there are no districts in Missouri for or from which candidates for the nomination for the office of Representative in Congress, to be voted for in the Primary Election to be held in Missouri on the first Tuesday in August, 1932, could legally file declarations and that there is no Tenth Congressional District in Missouri and that the Act of Congress of August 8, 1911, and particularly sections 3 and 4 thereof, have not been repealed and are in force and effect, and that the State of Missouri should be divided into 13 congressional districts, but that such districts had not been

created and established in accordance with the law and Constitution of Missouri, and that accordingly the respondent did not have authority to accept and file petitioner's said declaration of candidacy. Thereupon petitioner duly filed his motion for judgment on the pleadings (R. 52).

Thereafter, on January 4, 1932, said Supreme Court of Missouri entered final judgment against this petitioner and quashed the alternative writ of mandamus (R. 53).

B.

Reasons Relied on for the Allowance of the Writ. Importance of Questions Involved.

The matter of dividing a State into congressional districts is of nation-wide importance. Subsequent to the Federal census of 1930 the question of the manner of such districting was raised for the first time in at least four States; namely, Minnesota, New York, Illinois and Missouri, and in each State recourse has since been had to the Courts with contradictory results. It is, therefore, of the utmost importance, since the exercise of the power to redistrict a State for congressional purposes is controlled by Federal law, that the question be authoritatively determined by this Court.

The opinion and judgment of the Supreme Court of Minnesota, which is now before this Honorable Court for review pursuant to a writ of certiorari granted by this Court, is in direct conflict with the mentioned judgment and opinion of the Supreme Court of Missouri, and if this Court should uphold and affirm the judgment of the Supreme Court of Minnesota such action

by this Court would, of itself, probably have no effect on the situation in Missouri because the Supreme Court of Missouri, in its mentioned judgment and opinion, said:

> "Plainly, if the United States Supreme Court should affirm the judgment in the Minnesota case it would be because of the Minnesota Court's interpretation of its own constitution" (R. 62).

Petitioner, however, respectfully states that with reference to the matters here involved there is no substantial difference between the constitutions of Minnesota and Missouri, and the proceedings had in Missouri and in Minnesota with reference to the passage of the redistricting bills now in question, were practically the same.

Federal Law Erroneously Construed by State Court.

The Supreme Court of the State of Missouri in the case at bar has erroneously construed the applicable provisions of the Federal Constitution; has erroneously determined their effect, and has erroneously determined the question of the existence and the effect of certain applicable Federal statutes.

Conflict of Decision.

The decision of the Supreme Court of the State of Missouri in the case at bar in declaring void the redistricting of the State under said "Committee Substitute for Senate Bills 95, 141, and 147", is contrary to and in conflict with the decision of this Court in *Hawke* v. *Smith*, 253 U. S. 221, 64 Law Ed. 871, and

other applicable decisions of this Court; and is contrary to the applicable decisions of the Courts of other States, and particularly the decision of the Supreme Court of Minnesota in *State ex rel. Smiley v. Holm*, — Minnesota, page —, 238 N. W. 494.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Missouri, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket No. 31,668, the State of Missouri at the relation of John J. Carroll, Relator, *versus* Honorable Charles U. Becker, Secretary of State of the State of Missouri, Respondent, and that the judgment of the Supreme Court of the State of Missouri may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

JOHN J. CARROLL,
By E. F. COLLADAY,
Counsel for Petitioner,
1331 *"G" Street, Northwest,*
Washington, D. C.

Dated March 15th, 1932.

HYMAN G. STEIN,
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Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

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vs.

CHARLES U. BECKER, SECRETARY OF STATE OF THE STATE OF MISSOURI, JEFFERSON CITY, MISSOURI, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Acknowledgment is made of the courtesies extended by counsel interested in the pending redistricting cases in New York, Illinois and Minnesota.)

I.

Opinion of Court Below.

The opinion of the Supreme Court of the State of Missouri was rendered on January 4, 1932, and appears in — Missouri —, 45 Southwestern (2nd Series) 533,

and is set forth verbatim as Appendix "A", page 28, and in the record at page 53.

II.

Jurisdiction.

(1) The appellate and supervisory jurisdiction of the Supreme Court of the United States is invoked under Section 237, Judicial Code of the United States (28 U. S. C. A., Sec. 344), to correct error of the Supreme Court of the State of Missouri in the case cited in the last preceding paragraph. The petitioner brought suit in the Supreme Court of the State of Missouri to compel the respondent as Secretary of the State of Missouri to accept for filing and to file the written declaration of petitioner as a candidate for Representative from the Tenth Congressional District of the State of Missouri in the House of Representatives of the Congress of the United States, which said declaration of candidacy petitioner sought to file with respondent after the enactment in 1931 by the Legislature of the State of Missouri of an Act known as "Committee Substitute for Senate Bills 95, 141 and 147, 56th General Assembly of Missouri," by which Act the Legislature divided the State of Missouri into 13 congressional districts and provided that the legal voters of each district should elect one member of Congress of the United States. The respondent refused to accept for filing the petitioner's declaration of candidacy on the ground that the Act was invalid because it had been vetoed by the Governor. The petitioner brought his suit on the ground that the Act

passed by the Legislature was valid and that the division of the State into congressional districts by the Legislature was in conformance with the provisions of the Federal Constitution and laws and that the respondent's refusal to accept petitioner's declaration of candidacy was contrary to the provisions of the Federal Constitution and laws and deprived this petitioner of his political rights. The Supreme Court of Missouri upheld the contentions of the respondent and ruled and adjudged that said Act of the Legislature of Missouri was invalid.

(2) Final judgment of the Supreme Court of the State of Missouri herein was entered on the 4th day of January, 1932, 45 Southwestern 533 (2nd Series) (R. 53).

(3) The case at bar comes within the appellate jurisdiction of this Court under Section 237 of the Judicial Code, by reason of the admitted allegations set forth in the petition, which facts are not here repeated to save space and the time of this Court. The provisions of Article I, Section 4, and of the Fourteenth Amendment of the Federal Constitution, and the Federal Statutes, relating to the apportionment of representatives among the several States, were drawn in question, as well as the rights, privileges and immunities under the Federal Constitution and laws of the petitioner and other citizens similarly situated. The judgment of the Supreme Court of the State of Missouri held invalid said Act of the 56th General Assembly of the State of Missouri, to-wit: "Committee Substitute for Senate Bills 95, 141 and 147, 56th General

Assembly of Missouri," and adversely determined the claims of this petitioner based on said constitutional and statutory provisions, and denied the asserted rights, privileges and immunities of this petitioner and other citizens similarly situated.

This petitioner, as a resident, citizen and elector, is entitled to maintain this action to enforce and protect his political rights and the right to equality in the enjoyment thereof under the authority of the decision of this Court in *Nixon* v. *Herndon* (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759.

That this Court has jurisdiction in the premises on this petition invoking the Court's appellate and supervisory jurisdiction, is established by

Cumberland v. *Board of Revision* (1931), — U. S. —, 52 Sup. Ct. 48, 76 L. Ed. 131.

Santovincenzo v. *Egan* (1931), — U. S. 66, 52 Sup. Ct. 81, 125 (2), 76 L. Ed. 135.

Van Huffel v. *Harkelrode* (1931), — U. S. —, 52 Sup. Ct. 115, — L. Ed. —.

People of the State of New York v. *Zimmerman* (1928), 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

State ex rel. Davis v. *Hildebrandt* (1916), 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172.

Hawke v. *Smith*, 253 U. S. 221.

III.

Statement of Case.

The facts involved in the case at bar are not in dispute. The respondent in his return and in his

brief filed in the Supreme Court of Missouri admitted the enactment by the Legislature of the Bill in question in form and by proceedings as alleged by the petitioner and that the petitioner's declaration was in proper form and that he possessed the necessary qualifications and was and is entitled to file such declaration of candidacy if there be a Tenth Congressional District in the State of Missouri, but the respondent contended that there was no such district because the Act of the Legislature had been vetoed by the Governor and had not been passed by the Legislature thereafter over the Governor's veto. After the filing by the respondent of such return, the petitioner, claiming that the redistricting of the State was authoritatively complete without the Governor's approval, and in conformance with Article I, Section 4, of the Constitution of the United States, filed his motion for judgment on the pleadings.

IV.

Specifications of Error.

(1) The Supreme Court of the Sate of Missouri erred in refusing to issue a writ of mandamus to compel the respondent to receive and file the petitioner's written declaration as a candidate on the ticket of the Democratic Party of Missouri for the office of Representative from the Tenth Congressional District of the State of Missouri in the House of Representatives of the Congress of the United States.

(2) The Supreme Court of Missouri erred in entering judgment quashing the alternative writ of mandamus.

(3) The Supreme Court of the State of Missouri erred in construing the word "Legislature" in Article I, Section 4, of the Constitution of the United States when that Court ruled and held that the word "Legislature," in Article I, Section 4, of the Federal Constitution, means the two bodies of the State Legislature inclusive of the executive action of the Governor.

(4) The Supreme Court of the State of Missouri erred in holding that the word "Legislature" in Article I, Section 4, of the Federal Constitution means the law-making power of the State and includes the Governor as well as the Legislative body.

(5) The Supreme Court of the State of Missouri erred in holding that Sections 3 and 4 of the Act of Congress of August 8, 1911 (37 Stat. L. 13), are still in force and are not inconsistent with the Act of Congress of June 18, 1929 (46 Stat. L. 26).

V.

ARGUMENT.

Summary of Argument.

The petitioner claims that the division of the State of Missouri into 13 congressional districts by the Missouri Legislature at the 1931 session thereof by means of the Act known as "Committee Substitute for Senate Bills 95, 141, 147, 56th General Assembly of Missouri" is valid and that he was and is entitled to file his declaration as and to be a candidate on the ticket of the Democratic Party of Missouri for the office of Representative from the Tenth Congressional District of

the State of Missouri in the House of Representatives of the Congress of the United States and that the final judgment of the Supreme Court of Missouri quashing the alternative writ of mandamus and refusing to issue a writ of mandamus to compel the respondent to accept from this petitioner for filing and to file petitioner's written declaration as such candidate, are erroneous for the following reasons:

(*a*) Said Act entitled "Committee Substitue for Senate Bills 95, 141, and 147, 56th General Assembly of Missouri," is the action of the "Legislature" within the meaning of Article I, Section 4, of the United States Constitution.

(*b*) The Act of August 8, 1911 (37 Stat. L. 13), has expired by its own limitations and is no longer in effect and the Legislature, in redistricting the State, acted exclusively under Article I, Section 4, of the Federal Constitution.

The Ultimate Question Presented.

The issues may be summarized in one question for the determination of this Court:

Are the State Legislatures, when dividing the State into congressional districts, required to follow the procedure necessary in making laws?

POINT A.

(Assignment of Errors 1, 2, 3, and 4.) The Act known as "Committee Substitute for Senate Bills 95, 141, and 147, 56th General Assembly of Missouri," is

the action of the "Legislature" within the meaning of Article I, Section 4, of the United States Constitution. The authority of the State Legislature to prescribe congressional districts is derived exclusively from Article I, Section 4, of the Federal Constitution, which is as follows:

> "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators."
>
> *McCrary on Elections,* 4th Ed., Secs. 153, 154 and 155.
>
> *Baldwin* v. *Trowbridge* (an election contest), reported in 2 Bartlett, page 46.
>
> *State of Minnesota ex rel. Smiley* v. *Holm,* — Minn. —, 238 N. W. 494.

Accordingly the word "Legislature" as therein used is to be interpreted in accordance with its meaning as of the time of the adoption of the Constitution and the Court should ascertain and give effect to the intent of the framers and of the people who adopted it.

> *1 Colley's Constitutional Limitations,* 123.
>
> *Hawke* v. *Smith,* 253 U. S. 221.
>
> *Scott* v. *Sanford,* 60 U. S. 393.
>
> *12 Corpus Juris* 718.
>
> *12 Corpus Juris,* pages 720 and 728.

Clearly, therefore, the Governor's right to act upon the redistricting Bill enacted by the 56th General Assembly of the State of Missouri is to be determined

by ascertaining the meaning of the term "Legislature" as found in said section. If the framers of the Constitution used the word "Legislature" in its ordinary sense and did not include the Governor as a part thereof, it necessarily follows that his veto of the mentioned Act is a mere nullity.

Whatever the term "Legislature" meant to the framers of the Constitution when it was adopted it still means.

Hawke v. *Smith,* 253 U. S. 221.

The rule is thus stated in 1 Cooley's Constitutional Limitations 123:

> "The Constitution was not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the same case desirable."

The United States Constitution was ratified by conventions of delegates chosen by the people in 11 of the States before the new Government was organized under it and the remaining two, North Carolina and Rhode Island, ratified it some time later. (1 Cooley's Constitutional Limitations 9.)

Congressman Reed of New York (Congressional Record, Volume 71, part 3, page 2445) in discussing the word "Legislature" as understood by the framers of the Constitution, said:

> "At the very time that the convention was considering Article I, Section 4, and using the word 'Legislature' the members of that conven-

tion had fresh in their memory the unpopularity of the royal governors because of their abuse of the veto power. The bitterness of the people toward the arbitrary abuse of this power by the royal governors must have produced some reaction upon those who were using the word 'Legislature' in a document which sought to protect the liberties of the people.

"Not only this, it is significant in considering the use of the word 'Legislature' in this section to keep in mind that only three States, Massachusetts, New Hampshire and New York, had seen fit to grant the veto power to the Governor. At the very time that the convention was considering the word 'Legislature' the Legislatures alone in eight States were concerned in enacting statutes."

This petitioner respectfully submits that his contention that the word "Legislature" as used in Article I, Section 4, of the Federal Constitution had reference to Legislatures as they were then known and that the framers, in employing the term, made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the Legislative body of the State, and that they did not use the term in its enlarged sense as meaning the State or the law-making power of the State or as including the Governor is supported by the historical facts which this petitioner has set forth in Appendix "E", page 43. An examination of Appendix "E" shows that at the time the Federal Constitution as adopted was agreed upon, 11 of the original States had adopted State Constitutions and in each of them the word

"Legislature" or its equivalent was defined, but not in any one of them was the Governor included as a part of the "Legislature."

Petitioner respectfully submits that the framers of the Constitution must have intended to provide for the uniform operation of that instrument among all of the original States and that the carrying out of such intention necessarily required that the word "Legislature" should mean the same in each State and this required the exclusion from that term of the Governor; otherwise the word would have meant one thing in three States in which the Governor had the right of veto and another in the remaining States in which the veto power did not exist, and if the Governor was not included in the term "Legislature" at the time the Constitution was framed and since the term has today the same meaning that it had when the Constitution was adopted (*Hawke* v. *Smith*, 253 U. S. 221), and since, as is set forth in *Lesser* v. *Garnett*, 258 U. S. 130, the States cannot impose any limitations on the Federal Constitution, it necessarily follows that the Governor of Missouri is not included in the term "Legislature" as used in said Section 4, Article I, Federal Constitution, and his veto of the Act of the "Legislature" pursuant to such section is a mere nullity.

As was pointed out by this Honorable Court in the case of *Hawke* v. *Smith*, 253 U. S., 221, a "Legislature" at the time the Constitution was framed was the representative body which made the laws of the people, and the term is often used in the Constitution with this evident meaning. In the last mentioned case, this

Court called attention to the fact that Article I, Section 2, prescribes the qualifications of electors of Congressmen as those "requisite for electors of the most numerous branch of the State Legislature"; that Article I, Section 3, provided that "Senators shall be chosen in each State by the Legislature thereof," and that this was the method of choosing Senators until the adoption of the Seventeenth Amendment, which made provision for the election of Senators by vote of the people; that in Article IV, the United States is required to protect every State against domestic violence upon application of the "Legislature," or of the Executive when the Legislature cannot be convened. That Article VI requires the members of the several Legislatures to be bound by oath or affirmation to support the Constitution of the United States; that, by Article I, Section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the Legislature of the State in which the same shall be; that Article IV, Section 3, provides that no new States shall be carved out of old States without the consent of the Legislatures of the States concerned. And this Court also stated, "there can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the States." In that case, the contention was made in effect, that the "Referendum" was included within the meaning of the word "Legislature" as used in Article V of the Federal Constitution. This contention was very apparently based upon the further claim that the term "Legislature" meant "the law making power," but

since this Court, in effect, ruled that the word "Legislature" as used in Article V does not mean "the law making power" and does not include the "Referendum," and since the word "Legislature" as used in Article V and as used in other parts of the Constitution, including Article I, Section 4, must have been given and intended by the framers of the Constitution to have the same meaning, petitioner respectfully submits that the word "Legislature" as used in Article I, Section 4, should be also construed as meaning the representative body which makes the laws of the State and not all the governmental machinery which constitutes the law making power of the State.

We believe it would be unreasonable to assume other than that the framers of the Constitution would have guarded against confusion, and clearly indicated and expressed their intention had they intended the term "Legislature" to be given and possess a different definition in each place in which it was inserted. The rule is thus stated in 12 *Corpus Juris*, page 706, "the presumption is that the same meaning attaches to a given word or phrase wherever it occurs in a Constitution."

If, therefore, the word "Legislature" as used in Article V does not mean the "law making power" then we submit that it does not mean "the law making power" when it is used in Article I, Section 4.

Petitioner believes the opinion of the Supreme Court of Minnesota, in the case of *State of Minnesota ex rel. Smiley* v. *Holm*, — Minnesota —, 238 N. W. 494, and which opinion petitioner does not incorporate herein because it is now before this Court for review, to be

most convincing and persuasive of the contentions herein advanced; and, particularly, does Petitioner desire to call to the attention of this Court the following language contained in the opinion of the Minnesota Supreme Court:

> "The Legislature, in districting the State, is not, strictly, in the discharge of legislative duties as a law making body—not acting in its sovereign capacity—but is acting as representatives of the people of the State under the power granted by said Article I, Section 4. It merely gives expression as to district lines in aid of the election of certain Federal officials; prescribing one of the essential details, serving primarily the Federal Government and, secondly, the people of the State. The Legislature is designated as a mere agency to discharge the particular duty. The Governor's veto has no relation to such matters; that power pertains, under the State Constitution, exclusively to State affairs."

This petitioner respectfully submits that it would have been perfectly proper and within the power of the framers of the Constitution to have prescribed that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by THE CHIEF EXECUTIVE thereof." Could it then have been reasonably contended, that the phrase "The Chief Executive thereof" included the "Legislature" because it is a part of the law making power? We believe that no one would serious support such contention, and if the phrase "the Chief Executive"

could not reasonably be interpreted as meaning the "law making power" it necessarily follows that by the same token the word "Legislature" should also be interpreted according to its ordinary meaning.

POINT B.

(Assignment of Errors 1, 2 and 5)

> "Committee Substitute for Senate Bills 95, 141, 147, 56th General Assembly of Missouri" is not rendered invalid by the provisions of the Act of Congress of August 8, 1911 (37 Stat. L. 13), because the Act of Congress of August 8, 1911, has expired by its own limitations and is no longer in effect, and the Legislature in redistricting the State, acted exclusively under Article I, Section 4 of the Federal Constitution.

As observed from the history of Congressional Reapportionment, which this petitioner has set out in Appendix "F," page 57, Congress for a long time passed apportionment acts following each decennial census. From the language and provisions of such statutes, it is apparent that they were intended to meet the change in population, and it was always apparently contemplated that ten years hence another law of similar character would be enacted.

The Act of June 18, 1929 (the effect of which was to reduce Missouri's Representatives in the House of Representatives from sixteen to thirteen members), as set forth in its title, provides (1) for the fifteenth and subsequent decennial censuses and (2) for apportionment of representation in Congress, and Section 22,

subdivision (b) thereof, while not depriving Congress of the right to pass an apportionment Act, does provide an arbitrary method of apportionment, to-wit, that if Congress fails to enact a law apportioning Representatives among the several State, then each State shall be entitled in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under said section or subsequent statute, to the number of Representatives shown in the statement provided for by said Act based upon the method used in the last preceding apportionment (which was the method known as the "Method of Major Fractions").

The title of the Act of August 8, 1911, reads:

> "An Act for the apportionment of Representatives in Congress among the several States under the thirteenth census."

Section 1 of this Act provided that the total number of members in the House of Representatives should be four hundred thirty-three and apportioned them among the several States. Certainly it is apparent that this Section is now of no further effect. Section 2 concerned itself only with the States of New Mexico and Arizona, and, therefore, is not here involved.

Section 3 provides that in every State "entitled under this apportionment to more than one Representative, the Representatives to the sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants and that the said districts shall be equal

to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

Clearly, from the title of the Act and the express use of the phrase "under this apportionment," Section 3 applied only to elections of Representatives under the apportionment following the thirteenth decennial census and expired by its own limitations when the apportionment it undertook to regulate had ceased to be in force. This question was involved in a discussion in Congress with reference to the Act of 1929 (Congressional Record, Vol. 71, Part 3, p. 2445) and a point of order having been raised, the Speaker of the House in ruling thereon said:

> "All the way through every provision of the Act of August 8, 1911, relates to 'this apportionment,' that is, the apportionment provided for in the Act of August 8, 1911."

The petitioner seeks to be a candidate at an election to be held pursuant and subsequent to an apportionment provided for by the Act of June 18, 1929, upon the enactment of which "this apportionment" provided for in Section 3 ceased to be in force.

By the same token and for the same reasons, Section 4 which provided "that in case of an increase in the number of Representatives in any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof," etc., has

ceased to be in force. The Act of 1911 was clearly enacted for a specific purpose and a limited period of time; that is, during such time as Representatives should be elected under the apportionment provided for by said Act of 1911.

It might be suggested that, because the method prescribed in the 1911 Act was followed subsequent to the fourteenth decennial census, and that because the 1911 Act is contained in the Code of Laws of the United States adopted June 30, 1926, and this codification is under an Act entitled "An Act to construe, codify and set forth the general and permanent laws of the United States in force December 7, 1925" that the 1911 law is general and permanent in character and stands until expressly repealed; but as was pointed out by the Supreme Court of Minnesota in the case of *State of Minnesota ex rel. Smiley* v. *Holm* (*supra*), Congress in 1920 did not enact a reapportionment law and, consequently, the 1911 statute served. It was a general and permanent law, at least for a time, and Congress very properly caused the same to be included in the Judicial Code in 1926. No reapportionment law having been passed by Congress in 1920, the Congress in 1929, apparently to meet the past omission and to avoid a repetition, enacted the 1929 law which called for the fifteenth and subsequent decennial censuses, and provided automatically for apportionment of representations in Congress. Petitioner respectfully submits that the clause "by the method used in the last preceding apportionment," as used in the 1929 Act related only to the arithmetical method of computation.

Petitioner also submits that the Act of August 8, 1911, has been repealed by the repealing clause (Section 21,) of the Act of Congress of June 18, 1929, Chapter 28 (46 Stat. L. 26).

Conclusion.

Petitioner, therefore, respectfully submits that this case calls for the exercise by this Honorable Court of its supervisory powers in order that a question of nation-wide importance shall be determined, and to correct error of the Supreme Court of the State of Missouri and to enable the State of Missouri to have the benefit of the same interpretation and adjudication of the matters here involved as will be given by this Court in the similar controversy now existing in the State of Minnesota, and over which said controversy in Minnesota this Court has already assumed jurisdiction, and that to such end a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Missouri and finally reverse it.

Respectfully submitted,

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APPENDIX "A".

Opinion Rendered January 4, 1932 by the Supreme Court of the State of Missouri.

IN THE SUPREME COURT OF MISSOURI, EN BANC.

OCTOBER TERM, 1931.

No. 31,668.

STATE EX REL. JOHN J. CARROLL, *Relator*,

v.

CHARLES U. BECKER, *Secretary of State, Respondent.*

A proceeding by mandamus to compel the Secretary of State to receive and file the relator's declaration of his candidacy for Congress of the United States. The petition recites portions of the Act of Congress, 1929, providing for the fifteenth and subsequent decennial censuses, and authorizing the president to transmit to each state a message designating the number of members of Congress apportioned to such state, in accordance with such census. It sets out a message of the President to Congress in pursuance of Section 22(*a*) of that Act, stating that Missouri is entitled to thirteen representatives in Congress; sets out a bill introduced in the Fifty-Sixth General Assembly of the State of Missouri redistricting the State into thirteen congressional districts, the Tenth District thereof comprising certain wards and precincts in the City of St. Louis; that said bill duly passed the Senate and the House and was disapproved by the Governor in a veto message.

The relator, claiming that the redistricting of the State was authoritatively complete without the Governor's approval, sought to file his declaration as a candidate for the nomination on the Democratic ticket for Congressman from the said Tenth District, and the respondent Secretary of State refused to receive or file his declaration.

The above facts are admitted by respondent's return. The case is submitted on relator's motion for judgment on the pleadings.

I. The relator asserts the validity of the redistricting act and his right to file as a candidate for the nomination on the Democratic ticket from that district, under Section 4, Article I, of the Constitution of the United States, as follows:

> "The times, places and manner of holding election for representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations."

The point made by relator is that the word "legislature" in that section means the members comprising the legislative body acting in a ministerial capacity and does not mean the law-making power of the State, which includes the Governor as well as the legislative body. It is pointed out in the argument that the word "legislature" occurs many times in the Federal Constitution and in some of them, obviously from the context, it has the restricted meaning claimed for it here. Section 3, Article I of the Federal Constitution provides that the senators of the United States in each state shall be "chosen" by the legislature thereof. Article V of the Constitution, provides that an amendment to the Constitution shall be "ratified by the legislatures of three-fourths of the several states." Those

are instances where the word "legislature" does not mean the law-making power of the State. The election of a United States senator is merely by a vote; no law is enacted. Ratifying an amendment to the Federal Constitution likewise is a voted approval by the legislature; it is not the discharge of a law-making function. It is a ministerial act commanded by the United States Constitution. Relator claims that the word "legislature" in Section 4, Article I, has the same meaning.

Three cases recently have been determined in as many different states construing the word "legislature" as used in that section: State of Minnesota ex rel. *Smiley* v. *Holm*, decided October 9, 1931, not yet reported; In Re Application of *Koenig, et al.* v. *Flynn*, Secretary of State, Supreme Court of New York 1931, not yet reported; State ex rel. *Schrader* v. *Polley*, Secretary of State, 26 S. D. p. 5.

In the Minnesota case it was held that an Act of the legislature in that State, although vetoed by the Governor, was effective to redistrict the State into congressional districts on the ground that the word "legislature" as used in Section 4, Article I, of the Federal Constitution means merely the legislative body and does not mean the law-making power of the State.

In the Dakota case and the New York case it was held that the word "legislature" as used in Section 4, Article I, means the law-making power of the State. In the Minnesota case a memorandum by the Judge of the District Court and the opinion of the Supreme Court upon appeal are set out at length in a pamphlet filed here. The matter was argued at length with much plausability, although there was a dissenting opinion.

Section 2, Article I, of the Federal Constitution provides for an apportionment of representatives among the several states, and that provision was modified by Section 2 of Amendment XIV adopted in 1866, which

required representatives to be apportioned among the several states "according to their respective numbers counting the whole number of persons in each state including Indians not taxed."

A congressional apportionment has followed each decennial census beginning with that of 1790 until that of 1910. The act following the first census allowed a representative in each state for every thirty-three thousand persons, making 105 representatives in all. The population basis of representation was increased from time to time and in 1830 a representative was allowed for each 47,000 persons. Notwithstanding the increase of population for each representative the number of members of Congress increased very rapidly and in 1860 it was thought necessary to limit the number of representatives to 241. That limit was extended from census to census until the Act of 1911 following the census of 1910 limited the number to 433, and provided that if the territories of Arizona and New Mexico should become states each would be entitled to one representative, which made the total 435 when those states came in. No reapportionment act followed the census of 1920. The Act of 1929 did not increase the number of representatives but apportioned the 435 members among the states according to the provision in Amendment XIV; the number of representatives from Missouri, formerly 16, was reduced to 13.

The Act of 1842, following the census of 1840, for the first time provided that representatives should be elected by districts composed of contiguous territory, and the Act following the census of 1870 had the same provision with the addition that the districts should be as nearly as practicable equal in number of inhabitants. That act also provided that in states where there was an increased number of representatives the additional representatives should be elected at large, and other representatives entitled to be elected by the

districts then provided for, until the legislature of the state might otherwise provide.

Similar provisions appeared in each subsequent apportionment act until that following the census of 1900, which further provided that if the number provided should in any state be less than it was before the whole number in such state should be elected at large, unless the legislature of such state should provide otherwise.

The Act of 1911 contains the following pertinent sections:

> "SEC. 3. (Election by districts). That in each state entitled under this apportionment to more than one Representative, the Representatives to the sixty-third and *each subsequent Congress shall be elected* by districts composed of a contiguous and compact territory, and containing as nearly as practicable, an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative (37 Stat. L. 14).
>
> "SEC. 4. (Redistricting States—Representatives at Large). That in case of an increase in the number of Representatives *in any State* under this apportionment, such additional Representative or Representatives shall be elected by the State at large and *the other Representatives* by the districts now prescribed by law until such State shall be *redistricted in the manner provided by the laws thereof*, and in accordance with the rules enumerated in section 3 of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the dis-

tricts now prescribed by law until such State shall be redistricted as herein prescribed" (37 Stat. L. 14).

These provisions, respondent claims, are still in force because enacted in accordance with Section 4, Article I, of the Constitution providing that "Congress may at any time by law make or alter" the regulations mentioned. Section 4 of that Act (1911) provides that in case of an increase of representatives "*in any state*" under this apportionment, such additional representatives may be elected by the State at large: "and the *other representatives* by the districts *now prescribed by the laws thereof* and in accordance with the rules enumerated in Section 3 of this Act." The State of Missouri having no increase over the former apportionment comes under the head of "the other representatives." Its representatives are to be elected by the districts now prescribed by law until it shall be redistricted in the manner provided by the "laws thereof." Since the number of representatives for Missouri has been reduced the former districts no longer exist and representatives must be elected at large.

II. The above conclusion is on the assumption that the pertinent provisions of the Act of 1911 are still in force. In the Minnesota case it was held that sections 3 and 4 of that Act "expired by their own limitations," because the use of the words "under this apportionment" in both sections made them inapplicable to any other apportionment.

In the New York case the court reached a similar conclusion holding that the Act of 1911 was a temporary enactment because the language "under this apportionment" limited its operation. That Court dif-

fered from the Minnesota Court on the meaning of the word "legislature."

The Minnesota court said of the apportionment acts:

> "The history, nature, purpose and language of the several statutes disclose a clear intention on the part of Congress to have each of these apportionment acts replace its immediate predecessor. We believe it was the intention of Congress to have the Act of 1929 supersede and take the place of the entire statute of 1911."

If that is correct then there is no longer a requirement for congressional districts of any description. The Act of 1929 makes no mention of districts of contiguous territory and equal population. It does not mention districts or redistricting at all. The title of the Act discloses its purpose, "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representatives in Congress."

It establishes a permanent method for census taking and apportionment.

Section 21 of the Act repeals the Act of 1902 establishing a permanent census office and acts amendatory thereof. It repeals all other laws or parts of laws "inconsistent with the provisions of this act."

The provisions of sections 3 and 4 of the Act of 1911 are not inconsistent with the act of 1921. Neither are similar provisions in acts previous to the Act of 1911, relating to districts of contiguous territory of equal population and other regulations. Why did Congress think it necessary to repeal specifically other acts relating to a permanent census bureau and to apportionment, and to repeal other acts inconsistent with the Acts of 1929, unless it meant to leave in force other acts which were not inconsistent with it? If the Act

of 1911 expired by its own limitation in the use of the words "under this apportionment;" what of prior acts containing the same provisions about congressional districts which did not have those terms? Would they be in force? Certainly not if each of those apportionment acts "replaced" its immediate predecessor as held by the Minnesota Court. In Clause 1 of Section 22 of the Act of 1929 is mentioned the "method used in the *last preceding* apportionment." Does that mean merely the apportionment of representatives among the states, or does the "method" include redistricting the states which was included in the preceding apportionment? It seems to us that Congress did not intend by the Act of 1929 to abolish the requirement of congressional districts of contiguous territory of practically equal population and other provisions of previous acts. Nor do we think it was meant to repeal or supplant the other provisions of Sections 3 and 4 of the Act of 1911. Does the expression "under this apportionment" relate to every provision of Section 4? Or only to "such additional representatives" where the number for any state is increased?

The requirement in Section 4, for the election of "other representatives by districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof," applies to districts not affected by "this apportionment" and also to those in states where there was a decrease in the number of representatives. Are the provisions relating to those "other districts" limited to "this apportionment"? It is for the Federal courts to construe the Act of 1911, so far as it may or may not affect later apportionments.

III. Whatever the U. S. Supreme Court may decide about continued validity or expiration of the Act of 1911 the terms of sections 3 and 4 are significant as a congressional interpretation of Section 4, Article 1, of

the Constitution. It recognizes the "manner" of redistricting in the state to be "as provided by the laws thereof." It refers to districts existing as "the districts now (August 8, 1911) prescribed by law," meaning, of course, districts then existing by the laws of the several states. And that interpretation was recognized and approved by the Federal Supreme Court in the case of *Davis* v. *Hildebrand,* 241 U. S. 565, where the Act of 1911 came under consideration. The court there gave effect to the expression in the Act of 1911 "in the manner provided by the laws thereof," thereby giving judicial sanction to the congressional interpretation that the redistricting in a state should be made by the laws of the state. It went further and held that in Ohio the referendum was a part of the law-making power of the State, to be asserted in approving or disapproving a redistricting act by the legislature.

IV. It is contended by the respondent here that in the absence of any regulation by the Federal Constitution or Congress, each state had the inherent right to make its own districts for its congressional representatives on the theory that the powers of Congress and of the Federal government were delegated powers and all other powers were reserved to the States. That principle does not apply here. A member of Congress is not a state officer. He does not represent the State. He represents the people of the United States in the district from which he is elected. He is a United States officer. The states were in existence before "we, the people of the United States" adopted the Constitution. Each state in turn chose to accept the limitations of its sovereignty imposed upon it when it came under the Constitution. Congressmen were the creation of the Constitution,—purely federal officers over which a state has no control. So far as the State has authority to divide the state into congressional districts it de-

rives that authority from the Federal Constitution and the acts of Congress. Of course when the Constitution assigns to each state the right to elect representatives, if there is no provision as to how they are to be elected, by necessary implication a state would have the right to choose a method of carrying out the mandate.

V. In interpreting language used in a constitution or a statute the context is important. The word "legislature" means a political body of persons organized for the purpose of making laws. Appropriately it could not mean merely the members of that body. It cannot act *as* a legislature except in its official capacity. Its normal function is the enactment of laws. When assigned a certain duty that duty must be performed by the enactment of a law unless the context implies the exercise of some other function. What is the nature of the act to be performed? It is possible for the Federal Constitution or an act of Congress to assign to a state legislature the performance of a ministerial act. From the context, from the act to be performed must be determined whether something other than the normal function is to be exercised.

As pointed out above, choosing a senator of the United States or ratifying a constitutional amendment requires no exercise of the law-making power.

Compare those provisions with Section 4, Article I: "The times, places and manner of holding elections for senators and representatives shall be *prescribed* in each state by the legislature thereof."

The word "prescribe" as appropriate here, means "to lay down authoritatively a guide, direction, or a rule of action." That definition occurs in the dictionaries and in Corpus Juris.

"The time, places, and manner" of holding elections the legislature must prescribe. The acts to be performed contemplate the establishment of a rule of

action which can be accomplished only by that organized body in the enactment of a law. The "manner" of holding elections includes the qualifications of judges, the form of the ballots, and other details, all of which are fixed by law and can be provided only by establishing a rule, not merely for one election but for all elections. It may be said that prescribing those details is different from the forming of districts. The "manner of holding elections" includes everything that comes within the meaning of those words. It is the same legislature which performs all the acts constituting the "manner of holding elections." The word "legislature" cannot mean one thing for one of such duties and another thing for the rest. It cannot mean the law-making power in prescribing some of the details in the manner of holding elections and the mere individual action of the members in prescribing others.

Further, dividing a state into political subdivisions, or creating territorial districts of any kind, is a legislative act. *Haeussler* v. *Bates*, 306 Mo. l. c. 411. This Court said in *State ex. rel.* v. *Hitchcock*, 241 Mo. l. c. 457, "that the districting of the State into legislative senatorial, congressional and judicial districts is the exercise of legislative authority cannot be successfully questioned."

That case concerned the State Senatorial Districts and it might be claimed that the mention of congressional and judicial districts is obiter. Yet the same principle would apply. It is a legislative act. That case was quoted and approved in *State ex rel. Lashley* v. *Becker*, 290 Mo. 560. While there were dissenting opinions as to the result in the latter case, the principle was not questioned that dividing the state into districts is a legislative act.

However, all doubt about the meaning of the word "legislature" used in Section 4, Article I of the Federal Constitution was set at rest by the United States

Supreme Court, in *Hawke* v. *Smith*, 253 U. S. 221, where (l. c. 231) in discussing the difference between a ratification of a constitutional amendment and dividing a state into Congressional Districts that court said:

> "Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to the proposed amendment to the Constitution. In such expression no legislative action is authorized or required."

citing *Davis* v. *Hildebrand, supra.*

Plainly, if the United States Supreme Court should affirm the judgment in the Minnesota case it would be because of the Minnesota court's interpretation of its own constitution.

Congress never passed an act redistricting the states for the representatives in Congress. It has recognized the division of the states into districts under Section 4, Article I, of the Federal Constitution as accomplished by the laws of such states.

The alternative writ is quashed.

All concur.

J. T. WHITE,
Judge."

APPENDIX "B".

Missouri Constitution.

ARTICLE IV, SECTION 1. The Legislative Power, subject to the limitations herein contained shall be vested in a Senate and House of Representatives to be styled "The General Assembly of the State of Missouri."

APPENDIX "C".

The Act of 1929, 46 St. L. 26, June 18, 1929.

CHAP. 28. An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for the Apportionment of Representatives in Congress.

SECS. 1 to 20, inclusive. (Provide for the taking of the 1930 Census, outline the machinery, designate the Federal officials, their duties, etc.)

SEC. 21. That the Act establishing the permanent Census Office, approved March 6, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That an Act entitled "An Act to provide for the fourteenth and subsequent decennial censuses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

SEC. 22. (*a*) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions. No State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

(*b*) If the Congress to which the statement required by subdivision (*a*) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under Sections 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(*c*) This section shall have no force and effect in respect to the apportionment to be made under any decennial census unless the statement required by subdivision (*a*) of this section in respect to such census is transmitted to the Congress within the time prescribed in subdivision (*a*).

APPENDIX "D".

The Act of August 8th, 1911 (37 St. L. 13).

CHAP. 5. An Act for the apportionment of Representatives in Congress among the several States under the Thirteenth Census.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that after the third day of March, 1913, the House of Representatives shall be composed of four hundred thirty-three members, to be apportioned among the several States as follows:

(Here follows a list of the States with the number of Representatives allotted to each. Missouri has 16.)

SEC. 2. (Provision is made for the territories of Arizona and New Mexico and providing, in the event of their admission to the Union, that their Representatives shall be in addition to the 433 provided for in Section 1.)

SEC. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

SEC. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and other Repre-

sentatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in Section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

SEC. 5. (Provides that where Congressmen are to be elected at large, they shall be elected in the same manner as candidates for governor, unless otherwise provided by laws of the State.)

APPENDIX "E".

Historical facts which tend to show that the word "Legislature" as used in Article I, Section 4 of the Federal Constitution had reference to Legislatures as they were then known and that the farmers, in employing the term, made use of it in the ordinary sense with reference to the official body invested with the function of making laws, the legislative body of the State, and that they did not use the term in its enlarged sense as meaning the State or the law-making power of the State, or as including the Governor:

ARTICLE V of the Articles of Confederation of 1777 was as follows:

> For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the Legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them at any time within the year, and to send others in their stead, for the remainder of the year.

At the time the Constitution of the United States was framed, the Constitutions of the several states with reference to the organization of the Legislatures and provisions for the appointment of delegates to the Continental Congress were as follows:

Delaware—1776.

ARTICLE III—The Legislature shall be formed of two distinct branches; they shall meet once or oftener in every year and shall be called "The General Assembly."

ARTICLE VI—The President or Chief Magistrate shall be chosen by joint ballot.

ARTICLE XI—The delegates for the Congress of the United States of America shall be chosen annually or superseded in the meantime by joint ballot of both houses in the General Assembly.

Federal and State Constitutions compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. I, Page 562.

Georgia—1776.

ARTICLE II—The Legislature of this State shall be composed of the representatives of the people as is hereinafter pointed out; and the representatives so elected shall meet the first Tuesday in January following, at Savannah, or any other place or places where the House of Assembly for the time being shall direct.

On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a Governor who shall be styled "Honorable"; and of an executive council, etc.

ARTICLE XVI—The Continental delegates shall be appointed annually by ballot, etc. (Note: Although the above provision does not state by whom the dele-

gates were to be appointed, I find that, in practice, they were elected directly by the qualified electors.)

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 2, Page 777.

Maryland—1776.

ARTICLE I—That the Legislature consists of two branches, a senate and a house of delegates, which shall be styled "The General Assembly of Maryland."

ARTICLE XXVII—That the delegates to Congress from this State shall be chosen annually, or superseded in the meantime by the joint ballot of both Houses of Assembly.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 3, Page 1691.

Massachusetts—1780.

Chapter I.

ARTICLE I—The Department of Legislature shall be formed by two branches, a Senate and House of Representatives; each of whom shall have a negative on the other.

Chapter IV.

The delegates of this commonwealth to the Congress of the United States shall, some time in the month of June annually, be elected by the joint ballot of the Senate and House of Representatives, assembled together in one room; to serve in Congress for one year, to commence on the first Monday in November then next ensuing.

Federal and State Constitutions compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 3, Page 1893.

New Hampshire—1784.

The Supreme Legislative power within this State shall be invested within the Senate and House of Representatives, each of which shall have a negative on the other.

Federal and State Constitutions compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 4, Page 2458.

The Senate and House shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve and be dissolved, seven days next preceding the said first Wednesday of June; and shall be styled "The General Court of New Hampshire."

The delegates of this State to the Congress of the United States shall some time between the first Wednesday in June and the first Wednesday of September annually be elected by the Senate and House of Representatives in their separate branches.

New Jersey—1776.

ARTICLE I—That the Government of this province shall be vested in a Governor, Legislative Council and General Assembly.

ARTICLE VII—That the council and assembly, jointly, at their first meeting at each annual election shall, by a majority of votes, elect some fit person within the colony to be Governor for one year, who shall be constant president of the council and have a casting vote in their proceedings.

ARTICLE XV—That the laws of the colony shall begin in the following style, viz., "Be it enacted by the council and general assembly of this colony, and it is hereby enacted by the authority of the same." (Note:

I find no provisions for the election or appointment of delegates to the Continental Congress.)

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 5, Page 2594.

New York—1777.

ARTICLE II—This convention doth further in the name and by the authority of the good people of this State, ordain, determine and declare, that the Supreme Legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the Senate of the State of New York; who together shall form the Legislature, and meet at least once in every year for the despatch of business.

ARTICLE XXX—The delegates to represent this State in the General Congress of the United States of America shall be appointed annually as follows, to-wit:

The Senate and Assembly shall each openly nominate as many persons as shall be equal to the number of delegates to be appointed after which nomination they shall meet together and those persons named in both lists shall be delegates and out of those persons whose names are not in both lists, one-half shall be chosen by the joint ballot of the Senators and members of Assembly so met together as aforesaid.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 5, Page 2628.

North Carolina—1776.

ARTICLE I—That the Legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: A Senate and House of Commons.

ARTICLE IV—That the Senate and House of Commons, assembled for the purpose of legislation, shall be denominated The General Assembly;

ARTICLE XXXVII—That the delegates for this State to the Continental Congress while necessary, shall be chosen annually by the General Assembly, by ballot; but may be superseded, in the meantime, in the same manner.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 5, page 2790.

Pennsylvania—1776.

SECTION II—The Supreme Legislative Power shall be vested in a House of Representatives of the freemen of the Commonwealth or State of Pennsylvania.

SECTION XI—Delegates to represent this State in Congress shall be chosen by ballot by the future general assembly at their first meeting and annually forever afterwards, as long as such representation shall be necessary.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 5, page 3084.

South Carolina—1778.

ARTICLE II—That the Legislative authority be vested in a General Assembly to consist of two distinct bodies, a Senate and House of Representatives, but that the Legislature of this State, as passed by the Constitution or form of government, passed the 26th day of March, 1776, shall continue and be in full force until the 29th day of November ensuing.

ARTICLE XXII—That the delegates to represent this State in the Congress of the United States be chosen annually by the Senate and House of Representatives jointly, by ballot, in the House of Representatives and nothing contained in this Constitution shall be construed to extent to vacate the seat of any such member who is or may be a delegate from this State to Congress as such.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 6, page 3248.

Virginia—1776.

The Legislative, Executive and Judicial Departments shall be separate and distinct so that neither exercise the powers properly belonging to the other * * *

The Legislative shall be formed of two distinct branches, who together, shall be a complete Legislature. They shall meet once or oftener every year and shall be called "The General Assembly of Virginia." One of these shall be called the House of Delegates and * * * the other shall be called the Senate.

The delegates for Virginia to the Continental Congress shall be chosen annually or superseded in the meantime by joint ballot of both Houses of Assembly.

Federal and State Constitutions, compiled and edited under Act of Congress of June 30, 1906, by Francis Newton Thorpe, Vol. 7, page 3815.

Connecticut and Rhode Island.

The earliest Constitution of Connecticut which petitioner was able to find was adopted in 1818 and the only prior document found during petitioner's research was a charter from the Crown.

It also appears that Rhode Island had not adopted a Constitution at the time the Federal Constitution was framed.

The following is from an article by William Clarence Webster of New York, entitled "Comparative Study of the State Constitutions of the American Revolution" contained in volume 9, Annals of American Academy of Political and Social Science, pages 380 to 420:

> "All the Constitutions under consideration, except that of New Hampshire (1776), provided for a nominal chief executive. In reality, however, the Constitutions of Pennsylvania and Vermont did not establish a single executive by an executive board. * * * In all of the States but four, the chief executive was called 'Governor'; in Pennsylvania, New Hampshire, South Carolina and Delaware, he was called 'President.' In seven States (New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia) this official was elected by a joint ballot of the two houses of the Legislature; in Pennsylvania by joint ballot of the Assembly and Executive Council. In only four (Massachusetts, New York, Vermont, New Hampshire) by the direct vote of the qualified electors of the State * * * under most of the revolutionary Constitutions the Legislature was truly omnipotent and the executive correspondingly weak. Nearly all of these instruments conferred upon the former body practically unlimited power * * * In addition to full Legislative power these bodies were in many cases expressly endowed with important administrative powers at the expenses of the executive * * * The importance of the Legislature was furthermore enhanced in most States by limitations upon the

pardoning power. In only four States (New York, North Carolina, Maryland and Delaware) could the chief executive exercise this power alone."

(*b*) An examination of the minutes contained in the journal of the Federal Convention of 1787 and of Farrand's "Records of the Federal Constitution" and of Elliott's Debates, shows that the framers of the Constitution in considering the formation of Congress constantly referred to it as the "National Legislature" and they also, throughout the proceedings, referred to the "State Legislatures" and we have just observed how the Legislatures of the various States were formed, so that it is apparent that the framers used the term in its ordinary sense.

In discussing plans, the formation of the "National Legislature," one of the delegates, Mr. Mason of Virginia, during a debate on June 20, 1787, in the convention, said:

> "The people of America, like all other people, are unsettled in their minds and their principles fixed to no object, except that a republican government is the best and that the Legislature ought to consist of two branches. The Constitutions of the respective States made and approved by them evinced this principle."

That the framers of the Constitution did not intend that the Governor should have any voice in the selection of members of the House of Representatives or in determining the manner in which they should be selected, is apparent from the following argument made during the convention by Mr. Madison (Farrand's Records of the Federal Constitution, Vol. 2, p. 35):

> "Experience has proved a tendency in our governments to throw all power into the Legisla-

tive vortex. The executives of the States are in general little more than cyphers; the Legislatures omnipotent."

In connection with this point, we also quote the following minutes contained in Farrand's "Records of the Federal Constitution," Vol. 1, p. 175:

"Madison.

Saturday, June 9th.

Mr. Gerry, according to previous notice given by him, moved 'that the national executive should be elected by the executives of the States whose proportion of votes should be the same with that allowed to the States in the election of the Senate.' * * *

He proposed that (mode) of appointing by the State executives as most analogous to the principle observed in electing the other branches of the National Government; **THE FIRST BRANCH BEING CHOSEN BY THE PEOPLE OF THE STATES, AND THE SECOND BY THE LEGISLATURES OF THE STATES; HE DID NOT SEE ANY OBJECT AGAINST LETTING THE EXECUTIVE BE APPOINTED BY THE EXECUTIVES OF THE STATE.**" (Bold-face caps ours.)

The minutes of the convention of June 7, 1787, show the following:

"The following resolution was submitted by Mr. Dickinson, seconded by Mr. Sherman; namely: 'Resolved that the members of the second branch of the National Legislature ought to be chosen by the individual Legislatures' * * * and on the question to agree to the same, it passed unanimously in the affirmative."

In Volume I of "Documentary Histories of the Constitution of the United States of America, derived from the records, manuscripts and rolls deposited in the Bureau of Rolls and Library of Department of State," page 309, we find that Article VI, Section 1, of Plan of the Constitution as reported to the convention on August 6, 1787, was as follows:

> "The times and places and the manner of holding the elections of the members of each House, shall be prescribed by the Legislature of each State, but their provisions concerning them may at any time be altered by the Legislature of the United States."

In Madison's minutes, Vol. 2, Ferrand's Records of the Federal Constitution, page 239, we find the following:

"Madison.

Thursday, August 9th, in Convention.

ARTICLE 6, Section one ('The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.')

Mr. Madison and Mr. Governor Morris moved to strike out 'each House' and (to insert 'the House of Representatives') the right of the Legislatures to regulate the times and places, etc. in (the election of Senators) being involved in the right of appointing (them), which was (disagreed to).

Division of the question being called, it was taken on the first part down to 'but their provisions concerning, etc.'

The first part was agreed to *nem. con.*

Mr. Pinkney and Mr. Rutledge moved to strike out the remaining part, viz.: 'but their provisions concerning them may at any time be altered by the Legislature of the United States.' The States they contended could and must be relied on in such cases.

Mr. Madison: 'The necessity of a general government supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrolled right of regulating the times, places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, should all vote for all the Representatives; or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the representation in the Legislatures of particular States, would produce a like

inequality in their representation in the National Legislature, as it was presumable that the counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist, 1. Of a Senate to be chosen by the State Legislatures. If the latter therefore could be trusted their Representatives could not be dangerous. 2. Of Representatives elected by the same people who elect the State Legislatures; surely then if confidence is due to the latter, it must be due to the former. It seemed as improper in principle—though it might be less inconvenient in practice, to give to the State Legislatures this great authority over the election of the Representatives of the people in the General Legislature, as it would be to give to the latter a like power over the election of their Representatives in the State Legislatures.'

Mr. King: 'If this power be not given to the National Legislature their right of judging of the returns of their members may be frustrated. No probability has been suggested of its being abused by them. Although this scheme of erecting the General Government on the authority of the State Legislatures has been fatal to the Federal establishment, it would seem as if many gentlemen still foster the dangerous idea.'

Mr. Governor Morris observed that the States might make false returns and then make no provisions for new elections. Mr. Sherman did not know but it might be best to retain the clause, though he had himself sufficient confidence in the State Legislatures. (The motion of Mr. P. and

Mr. R. did not prevail.) (The word 'respectively' was inserted after the word 'State').

On the motion of Mr. Read the word 'their' was struck out, and 'regulations in such cases' inserted in place of 'provisions concerning them.' (The clause then reading—'but regulations, in each of the foregoing cases may at any time, be made or altered by the Legislature of the U. S.) This was meant to give the National Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether.'

ARTICLE VI. As thus amended was agreed to *nem. con.* Adjourned."

On September 10, 1787, the Constitution was referred to the Committee on Style and Arrangement and throughout that instrument (except in two places) Congress was always referred to as "The Legislature" or as "The National Legislature." See Ferrand's "The Records of the Federal Constitution," Vol. 2, p. 565. The following are examples:

ARTICLE III. The Legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate. The Legislature shall meet at least once in every year, and such meeting shall be on the first Monday in December unless a different day shall be appointed by law.

ARTICLE VI, SEC. 1. The times and places and the manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State, respectively; but regulations in each of the foregoing cases may at any time be made or altered by the Legislature of the United States.

ARTICLE VII, SEC. 1. The Legislature shall have power to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States.

ARTICLE XI, SEC. 1. The judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as shall seem necessary, from time to time, but constituted by the Legislature of the United States.

ARTICLE XVII. New States may be admitted by the Legislature into the Union, etc.

APPENDIX "F".

History of Congressional Reapportionment.

Following the decennial census of 1790, Congress passed its first apportionment Act effective April 14, 1792 (1 Stat. L. 253). The Act provides for one Representative in each State for every thirty-three thousand persons. No reference was made to Congressional Districts and presumably all members of Congress were elected at large.

Following the census of 1800, Congress passed a second apportionment act in practically the same language as the Act of 1792 and providing for one Representative for each 33,000 persons (2 Stat. L. 128).

Following the census of 1810, the third apportionment act was passed. The only difference between this Act and the two preceding Acts was that the ratio was changed to one member for every 35,000 persons (2 Stat. L. 669).

Following the 1820 census, the fourth apportionment Act was enacted, substantially the same as those pre-

ceding, except that the basis of representation was fixed at one Representative for every 40,000 persons. No reference is made to congressional districts (3 Stat. L. 651).

After the census of 1830, the fifth apportionment Act was passed, increasing the basis of representation to one member for every 47,000 persons, there still being no reference to congressional districts (4 Stat. L. 516).

Reference to Congressional Districts was made for the first time in Apportionment Legislation in the Act of Congress effective June 25, 1842, which followed the 1840 census and, more particularly in Section 2 thereof, which provides that:

> "In every case where a State is entitled to more than one Representative in Congress, the members shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which such State may be entitled, no one district to be entitled to more than one Representative" (5 Stat. L. 491).

No reference to Congressional Districts having been made in Apportionment Legislation prior to 1842, presumably members of Congress had been previously elected at large or by districts determined by the several State Legislatures independently of congressional action.

In 1850 provision was made for taking the seventh decennial census and in the census Act the Secretary of the Interior was authorized to apportion Representatives in Congress among the several States and the Act fixed the number of Representatives at two hundred and thirty-three. This Act provided for electing one Representative at large for each major fractional of the ratio and apparently this was the first

time that Congress provided for taking the census and determining the representation in Congress in the same Act.

Following the census of 1860 the number of Representatives was fixed at two hundred forty-one, and additional members were assigned to certain States, but no mention was made as to congressional districts (12 Stat. L. 353).

Ten years later the number of Representatives was fixed at two hundred eight-three, to be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. Provision was also made for electing members at large in States in which an increased number of Representatives had been given by law, and providing that the other Representatives to which any State might be entitled should be elected by the districts then provided for, until the Legislature of said State might otherwise provide (17 Stat. L. 28).

The Act of February 25, 1882, fixes the number of members of the House at three hundred twenty-five and makes no mention as to the ratio of representation and provides that members shall be elected by districts composed of contiguous territory and which contain as nearly as practicable an equal number of inhabitants. The provisions of the Act are limited to the election of Congressmen thereunder. There was also a provision for electing members at large in case of an increase in the number of Representatives of the State, similar to that contained in the Act of 1872 (22 Stat. L. 5).

In 1891 the number of Representatives was fixed at three hundred fifty-six and apportioned among the several States. The Act also provided for election "under this apportionment" by districts composed of contiguous territory containing as nearly as practi-

cable an equal number of inhabitants. There was also provision for election of Representatives at large, similar to that contained in preceding Acts (26 Stat. L. 735).

Following the census of 1900 an apportionment Act was passed containing substantially the same provisions, both in regard to providing the States with congressional districts and electing Representatives at large "under this apportionment" and containing also the following provision:

> "If the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number in such State hereby provided for shall be elected at large, unless the Legislatures of said States have provided or shall otherwise provide, before the time fixed by law for the next election of Representatives therein" (31 Stat. L. 733).

Following the census of 1910 by Act of Congress approved August 8, 1911 (37 Stat. L. 13) the number of representatives was fixed at four hundred thirty-three and certain significant changes were made in the language theretofore generally used in such Acts. All prior Acts in which reference was made to redistricting, required that the same be done by the legislatures of the several states, but as appears from the debates on the subject in the Senate (Congressional Record, Vol. 47, part 4, page 3555) and in the House of Representatives (Congressional Record, Volume 47, part 1, pages 673, 674, 675, 676, 701, 702, 703, 704 and 705) for the purpose of permitting the exercise of the right of the referendum provided for by the Constitutions of some of the states in connection with reapportionment legislation Section 4 of the Act was made to read as follows:

"4. In case of an increase in the number of Representatives in any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, until such State shall be redistricted in the manner provided by the laws thereof, and in accordance with the rules enumerated in Section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

As a result of this change each State was "to be redistricted in the manner provided by the laws thereof" instead of "by the Legislature." This language was construed by the Supreme Court of the United States in the State of Ohio ex rel. Davis v. Heldebrandt, 241 U. S. 565, and in that case the Court ruled that, by providing that the redistricting of the congressional districts should be made by each State "in the manner provided by the laws thereof," it was manifest that Congress intended that the referendum should be considered in States wherein the referendum prevailed with reference to reapportionment.

In 1920 the census was duly taken, but the usual apportionment Act was not passed and consequently Representatives in Congress since 1911 have been elected pursuant to the Act of 1913, notwithstanding the intervening census of 1920.

The Seventy-first Congress by the Act of June 18, 1929 (set out hereinbefore) not only made provision for taking the census, but also made provision for (in effect) an automatic apportionment of Representa-

tives in Congress following the fifteenth decennial census and every census thereafter. The Act permits Congress to pass an apportionment Act, but it also provides an arbitrary method of apportionment in case Congress fails to act in this regard.

The Seventy-first Congress adjourned without passing an apportionment Act, and accordingly, Section 22, subdivision (b) of the Act of June 18, 1929, became effective; and pursuant thereto the Clerk of the House of Representatives transmitted to the Governor of Missouri, a certificate showing that Missouri was entitled in the Seventy-third Congress and until the taking effect of a reapportionment under said Act or a subsequent statute, to thirteen Representatives.

We respectfully call the attention of the Court to the fact that all of the apportionment Acts above referred to prior to the Act of 1929, deal only with the election of Representatives in Congress under a particular apportionment; for example, Section 4 of the Act of August 8, 1911, supra, states "in case of an increase in the number of Representatives in any State under this apportionment * * *"